

CRS Report for Congress

The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms

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The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms

Summary

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§601-612) requires federal agencies to assess the impact of their forthcoming regulations on “small entities” (i.e., small businesses, small governments, and small not-for-profit organizations). For example, the act requires the analysis to describe why a regulatory action is being considered; the small entities to which the rule will apply and, where feasible, an estimate of their number; the projected reporting, recordkeeping, and other compliance requirements of the rule; and any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities. This analysis is not required, however, if the head of the agency certifies that the rule will not have a “significant economic impact on a substantial number of small entities.” The RFA does not define “significant economic impact” or “substantial number of small entities,” thereby giving federal agencies substantial discretion regarding when the act’s requirements are triggered. Other requirements in the RFA and elsewhere (e.g., that agencies reexamine their existing rules, develop compliance guides, and convene advocacy review panels) also depend on whether the agencies determine that their rules have a “significant” impact on a “substantial” number of small entities.

GAO has examined the implementation of the RFA many times during the past 20 years, and has consistently concluded that the lack of clear definitions for key terms like “significant economic impact” and “substantial number of small entities” have hindered the act’s effectiveness. Therefore, GAO has repeatedly recommended that Congress define those terms, or give the Small Business Administration or some other federal agency the authority and responsibility to do so.

H.R. 4458, the “Small Business Regulatory Improvement Act,” was introduced on December 12, 2007, and was reported by the House Committee on Small Business the next day. Among other things, H.R. 4458 would define “economic impact” as including indirect effects that are “reasonably foreseeable,” and would clarify that agencies’ reviews of existing rules should not be limited to rules for which a regulatory flexibility analysis had been conducted. The bill would also require agencies to develop a plan for the review of all existing rules within 10 years, require more details in agencies’ analyses and notifications, and require annual reports to Congress on certain agency “determinations” as part of their reviews. Although some of these provisions address long-standing issues, some provisions seem unclear and some may add time and costs to the rulemaking process. Most notably, though, H.R. 4458 does not address GAO’s long-standing concerns about the lack of clear definitions for key terms in the RFA.

This report will be updated if H.R. 4458 is acted upon, or if other relevant actions occur.

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The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms

Regulatory Flexibility Act Requirements

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§601-612), requires federal agencies to assess the impact of their forthcoming rules on “small entities,” which the act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Under the RFA, virtually all federal agencies (i.e., Cabinet departments and independent agencies as well as independent regulatory agencies) must prepare a regulatory flexibility analysis at the time that proposed and certain final rules are published in the *Federal Register*. The analysis for a proposed rule is referred to as an “initial regulatory flexibility analysis” (IRFA), and the analysis for a final rule is referred to as a “final regulatory flexibility analysis” (FRFA). The act requires the analyses to describe, among other things, (1) why the regulatory action is being considered and its objectives; (2) the small entities to which the rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the rule; and, for final rules, (4) steps the agency has taken to minimize the impact of the rule on small entities, including the alternatives considered and why the selected alternative was chosen.

However, these analytical requirements are not triggered if the head of the issuing agency certifies that the rule would not have a “significant economic impact on a substantial number of small entities” (hereafter referred to as a “SEISNSE”). The RFA does not define “significant economic impact” or “substantial number of small entities,” thereby giving federal agencies substantial discretion regarding when the act’s analytical requirements are initiated. Also, the RFA’s analytical requirements do not apply to final rules for which the agency does not publish a proposed rule.¹

The RFA also contains several other notable provisions. For example, Section 602 requires each federal agency to publish a “regulatory flexibility agenda” in the *Federal Register* each April and October listing regulations that the agency expects

¹ Many agencies are apparently aware of this limitation; the General Accounting Office (GAO, now the Government Accountability Office) estimated that in more than 500 final rules published in 1997 the agencies specifically stated that the RFA was not applicable or that a regulatory flexibility analysis was not required because the action was not preceded by an NPRM. See U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126, Aug. 31, 1998, p. 31.

to propose or promulgate which are likely to have a SEISNSE.² Section 612 of the act requires the Chief Counsel of the Small Business Administration's (SBA's) Office of Advocacy to monitor and report at least annually on agencies' compliance with the act. The statute also specifically authorizes the Chief Counsel to appear as *amicus curiae* (i.e., "friend of the court") in any court action to review a rule.

The RFA initially did not permit judicial review of agencies' actions under the act. However, amendments to the act in 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA) (110 Stat. 857, 5 U.S.C. §601 note) permitted judicial review regarding, among other things, agencies' regulatory flexibility analyses for final rules and any certifications that their rules will not have a SEISNSE. As a result, for example, a small entity that is adversely affected or aggrieved by an agency's determination that its final rule would not have a significant impact on small entities could seek judicial review of that determination within one year of the date of the final agency action. In granting relief, a court may remand the rule to the agency or defer enforcement against small entities. The addition of judicial review in 1996 is generally viewed as a significant strengthening of the RFA, and is believed to have improved agencies' compliance with the act.³

In August 2002, President George W. Bush issued Executive Order 13272, which was intended to promote compliance with the RFA.⁴ The executive order requires agencies to issue written procedures and policies to ensure that the potential impacts of their draft rules on small entities are properly considered, and requires them to notify the Office of Advocacy of any draft rules with a SEISNSE. Also, the order requires the SBA Chief Counsel for Advocacy to "notify agency heads from time to time" of the requirements of the RFA, and to provide training to agencies on RFA compliance. It also permits the Chief Counsel to provide comments on draft rules to the issuing agency and to the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget. The Office of Advocacy published

² This requirement, as well as a similar requirement in Executive Order 12866, is generally met via entries in the *Unified Agenda of Federal Regulatory and Deregulatory Actions*. The *Unified Agenda* is published twice each year in the *Federal Register* by the Regulatory Information Service Center, and provides uniform reporting of data on regulatory activities under development throughout the federal government.

³ U.S. Small Business Administration, *20 Years of the Regulatory Flexibility Act: Rulemaking in a Dynamic Economy* (Washington: 2000).

⁴ U.S. President (Bush), "Proper Consideration of Small Entities in Agency Rulemaking," Executive Order 13272, 67 *Federal Register* 53461, Aug. 13, 2002. This executive order essentially formalized agreements that had been in place for more than seven years. In response to a previous GAO recommendation, on Jan. 11, 1995, the SBA Chief Counsel for Advocacy and the OIRA Administrator exchanged letters committing the two offices to work together more closely. Specifically, SBA said it would develop new guidance for agencies to follow in complying with the act, and would provide OIRA with a copy of any comments it files with an agency concerning compliance with the RFA. OIRA said it would consider RFA compliance as part of its reviews under Executive Order 12866, and would include SBA in the process when appropriate. See U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies' Compliance*, GAO/T-GGD-95-112, Mar. 8, 1995, pp. 4-5.

guidance on the RFA in 2003 and reported training more than 20 agencies on compliance with the act in FY2005.⁵

Other Requirements Are Linked to RFA Determinations

In addition to triggering an initial or final regulatory flexibility analysis, an agency's determination that a rule has a SEISNSE can initiate other actions. For example, when enacted in 1980, Section 610 of the RFA required agencies to publish a plan in the *Federal Register* within 180 days that would provide for the review of all of their then-existing rules within 10 years, and for the review of all subsequent rules within 10 years of their publication as a final rule. The Section 610 requirement applies to those rules that the agencies determined "have or will have" a SEISNSE, and the purpose of the review is to determine whether the rule should be continued without change or should be amended or rescinded to minimize its impact on small entities. One way some agencies have decided which rules should be reviewed is by focusing only on those rules for which a final regulatory flexibility analysis was conducted at the time the final rule was issued. However, other agencies view Section 610 as requiring them to review all of their rules to determine whether they have currently a SEISNSE, regardless of their previous determinations.⁶ Either way, agencies have considerable discretion in deciding what constitutes a "significant" impact and a "substantial" number of small entities, and therefore what rules (if any) are covered by this requirement.

SBREFA established two new requirements that are also triggered by agencies' determinations under the RFA — e.g., compliance guides and advocacy review panels.

Compliance Guides. Section 212 of SBREFA requires agencies to develop one or more compliance guides for each final rule or group of related final rules for which the agency is required to prepare an FRFA.⁷ Specifically, Section 212 requires the guides to be posted in an easily identifiable location on the agency's website and distributed to "known industry contacts," be entitled "small entity compliance guides," and explain the actions a small entity is required to take to comply with an associated final rule. The statute also requires the guide to be published not later than

⁵ See U.S. Small Business Administration, Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (Washington: May 2003), available at [<http://www.sba.gov/advo/laws/rfaguide.pdf>]. The Office of Advocacy had issued similar guidance previously. For example, see U.S. Small Business Administration, Office of Advocacy, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies* (Washington: 1998), available from the author.

⁶ GAO reported in 1999 that EPA conducted Section 610 reviews only for rules that it concluded had a SEISNSE at the time the final rules were promulgated. The Department of Transportation, on the other hand, interpreted the statute to require a review of all rules. See U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary*, GAO/GGD-99-55, Apr. 2, 1999, pp. 11-12.

⁷ Section 212 was amended by Subtitle C of the U.S. Troop Readiness, Veterans Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (P.L. 110-28, May 25, 2007). This description includes those amendments.

the date that the associated rule's requirements become effective. However, an agency does not have to prepare the compliance guides at all if it determines that the rule or group of rules does not have a "significant" economic impact on a "substantial" number of small entities.

Advocacy Review Panels. Section 244 of SBREFA amended Section 609 of the RFA to require the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene "advocacy review panels" before publishing an IRFA for a proposed rule. Specifically, the agency issuing the regulation (either OSHA or EPA) must notify the SBA Chief Counsel for Advocacy and provide information on the draft rule's potential impacts on small entities and the type of small entities that might be affected. The Chief Counsel then must identify representatives of affected small entities within 15 days of the notification. The review panel must consist of full-time federal employees from the rulemaking agency, the Office of Management and Budget, and SBA's Chief Counsel for Advocacy. During the panel process, the panel must collect the advice and recommendations of representatives of affected small entities about the potential impact of the draft rule. The panel must report on the comments received and on its recommendations no later than 60 days after the panel is convened, and the panel's report must be made public as part of the rulemaking record.⁸ However, EPA and OSHA do not have to hold an advocacy review panel at all if the issuing agency certifies that the subject rule will not have a "significant" economic impact on a "substantial" number of small entities.

GAO Assessments of the RFA's Implementation

GAO has commented on the implementation of the RFA numerous times within the past 15 to 20 years, and a recurring theme in GAO's reports is a lack of clarity in the act regarding key terms and a resulting variability in the act's implementation. For example, in 1991, GAO reported that each of the four federal agencies that it reviewed had a different interpretation of key RFA provisions — most notably, what constitutes a "significant" economic impact or a "substantial" number of small entities.⁹ In 1994, GAO again reported that agencies' compliance with the RFA varied widely from one agency to another and that agencies were interpreting the statute differently.¹⁰ In a 1999 report on the implementation of Section 610 of the RFA and in a 2000 report on the implementation of the RFA at EPA, GAO concluded that agencies had broad discretion to determine what the statute required.¹¹

⁸ For an examination of how the first five advocacy review panels were implemented, see U.S. General Accounting Office, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, GAO/GGD-98-36, March 18, 1996.

⁹ U.S. General Accounting Office, *Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments*, GAO/HRD-91-16, Jan. 11, 1991.

¹⁰ U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies' Compliance*, GAO/GGD-94-105, Apr. 27, 1994.

¹¹ U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary*, GAO/GGD-99-55, Apr. 2, 1999; U.S. General Accounting (continued...)

In the 2000 report, GAO determined that EPA had certified virtually all of its rules after 1996 as not having a SEISNSE, and that the rate of certifications increased substantially after the passage of SBREFA. In all of these reports, GAO suggested that Congress consider clarifying the act's requirements, give SBA or some other entity the responsibility to develop criteria for whether and how agencies should conduct RFA analyses, or both. In 2001, GAO testified that the promise of the RFA may never be realized until Congress or some other entity defines what a "significant economic impact" and a "substantial number of small entities" mean in a rulemaking setting.¹²

In 2002, GAO again testified that the implementation of the RFA was still problematic, and raised more questions about how the statute should be interpreted.¹³ For example, GAO said, in determining whether a rule has a significant impact on small entities, should agencies take into account the cumulative impact of similar rules in the same area? Should agencies consider the RFA triggered when a rule has a significant positive impact on small entities? GAO went on to say the following:

These questions are not simply matters of administrative conjecture within the agencies. They lie at the heart of the RFA and SBREFA, and the answers to the questions can have a substantive effect on the amount of regulatory relief provided through those statutes. Because Congress did not answer these questions when the statutes were enacted, agencies have had to develop their own answers — and those answers differ. If Congress does not like the answers that the agencies have developed, it needs to either amend the underlying statutes and provide what it believes are the correct answers or give some other entity the authority to issue guidance on these issues.¹⁴

In 2006, GAO again testified that "the full promise of RFA may never be realized until Congress clarifies key terms and definitions in the Act, such as 'a substantial number of small entities,' or provides an agency or office with the clear authority and responsibility to do so."¹⁵ In addition to the areas raised previously, GAO said that numerous other issues regarding the RFA remain unresolved, including:

- how Congress believes that the economic impact of a rule should be measured (e.g., in terms of compliance costs as a percentage of

¹¹ (...continued)

Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, Sept. 20, 2000.

¹² U.S. General Accounting Office, *Regulatory Flexibility Act: Key Terms Still Need to Be Clarified*, GAO-01-669T, Apr. 24, 2001.

¹³ U.S. General Accounting Office, *Regulatory Flexibility Act: Clarification of Key Terms Still Needed*, GAO-02-491T, Mar. 6, 2002.

¹⁴ *Ibid.*, pp. 2-3.

¹⁵ U.S. Government Accountability Office, *Regulatory Flexibility Act: Congress Should Revisit and Clarify Elements of the Act to Improve Its Effectiveness*, GAO-06-998, July 20, 2006.

businesses' annual revenues, the percentage of work hours available to the firms, or some other metric);

- whether agencies should count the impact of the underlying statutes when determining whether their rules have a significant impact;
- what should be considered a “rule” for purposes of the requirement that agencies review their rules within 10 years of their promulgation; and
- whether agencies should review all rules that had a SEISNSE at the time they were originally published as final rules, or only those rules that currently have that effect.

Therefore, GAO said “Congress might wish to review the procedures, definitions, exemptions, and other provisions of RFA to determine whether changes are needed to better achieve the purposes Congress intended.” Also, GAO said “attention should ... be paid to the domino effect that an agency’s initial determination of whether RFA is applicable to a rulemaking has on other statutory requirements, such as preparing compliance guides for small entities and periodically reviewing existing regulations.”

Although GAO has consistently called for greater clarity in the RFA’s requirements, other observers have indicated that the definitions of key terms like “significant economic impact” and “substantial number of small entities” should remain flexible because of significant differences in each agency’s operating environment. Notably, the SBA Office of Advocacy said that “[n]o definition could, or arguably should, be devised to apply to all rules given the dynamics of the economy and changes that are constantly occurring in the structure of small-entity sectors.”¹⁶ In its guidance on the RFA, SBA said the lack of clear definitions in the act “does not mean that Congress left the terms completely ambiguous or open to unreasonable interpretations.”¹⁷ Quoting the legislative history of the act in 1980, SBA said the diversity of both the community of small entities and of rules themselves makes a precise definition of the term “significant economic impact” virtually impossible and possibly counterproductive. Illustrative examples of “significant” economic impacts cited in the guidance range widely — from \$500 in compliance costs to a 2% reduction in revenues if an industry’s profits are 3% of revenues. Similarly, the guidance suggests that determinations of whether a “substantial number” of small entities are affected should begin with what it called the “more than just a few” standard, but ultimately does not require agencies to find that more than half of small entities would be affected.

Proposed Changes to the RFA by H.R. 4458

On December 12, 2007, H.R. 4458 — the “Small Business Regulatory Improvement Act” — was introduced by Representative Brad Ellsworth and nine

¹⁶ U.S. Small Business Administration, Office of Advocacy, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies* (Washington: 1998), p. 16.

¹⁷ *Ibid.*, p. 18.

cosponsors, and the bill was referred to the House Committee on the Judiciary and the House Committee on Small Business. On December 13, 2007, the House Small Business Committee unanimously reported the bill. No action on H.R. 4458 has been scheduled by the House Committee on the Judiciary, and no comparable legislation has been introduced in the Senate. Similar legislation was introduced in the 109th Congress (H.R. 682 and S. 1388), but was not acted upon.

H.R. 4458 would make a number of changes to the RFA — all of which are supported by the SBA Office of Advocacy and small business representatives.¹⁸ For example, Section 3 of the bill would amend Section 601 of the RFA and define “economic impact” to include direct economic effects of a rule on small entities as well as any indirect effect “which is reasonably foreseeable and results from such rule.” Section 4 of the bill would make several changes to the RFA’s requirements for IRFAs, FRFAs, and certifications — adding new analytical or reporting requirements, and adding to the level of detail in existing requirements. (Most of those changes are discussed later in this report.)

Section 5 of H.R. 4458 would amend Section 610 of the RFA and establish new requirements for the periodic review of rules. Specifically, within 180 days after enactment, the bill would require agencies to publish in the *Federal Register* and on their websites a plan for reviewing all existing rules that the agency heads determine have a SEISNSE — regardless of whether the agency published a FRFA under Section 604 of the RFA at the time the rule was promulgated. The plan must provide for the review of all existing rules within 10 years after the enactment of the legislation (although the agency head may extend that deadline by two years if completion of the reviews is not feasible), and for the review of rules issued after enactment within 10 years of their publication in the *Federal Register*. Also, each agency must publish a list of the rules to be reviewed pursuant to the plan, including why the agency determined each rule has a SEISNSE, and must request comments from the public, the SBA Chief Counsel for Advocacy, and the Regulatory Enforcement Ombudsman on the “enforcement” of the rule. Finally, the bill would require agencies to submit reports annually to Congress and, for agencies other than independent regulatory agencies, the OIRA Administrator. The annual report is to include (1) the identification of any rule for which the agency head had “made a determination” regarding whether the rule overlaps or conflicts with other rules, and the length of time since the rule had previously been evaluated; and (2) a “detailed explanation of the reasons for such determination.”

¹⁸ Ralph Lindeman, “SBA Advocacy Chief Urges Legislation To Strengthen Regulatory Flexibility Act,” *BNA Daily Report for Executives*, Dec. 7, 2007, p. A-28. The Office of Advocacy has supported similar provisions in other legislation. See testimony of SBA Chief Counsel for Advocacy Thomas M. Sullivan, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Regulatory Flexibility Improvements Act — H.R. 682*, hearings, 109th Cong., 2nd sess., July 20, 2006. Individuals from SBA have also written in support of similar provisions. See Keith W. Holman, “The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goal?” *Fordham Urban Law Journal*, vol. 33 (May 2006), pp. 1119-1137.

Analysis of H.R. 4458

Some of the provisions in H.R. 4458 appear to address certain long-standing issues of concern regarding the implementation of the RFA. Other provisions appear to add to the number or depth of the analytical and notification requirements placed on rulemaking agencies, and some other provisions seem unclear. But H.R. 4458 may be most notable for what it does not do; it does not clarify what constitutes a “significant” economic impact on a “substantial” number of small entities. Therefore, agencies will still be able to determine when a regulatory flexibility analysis is needed (and, consequently, when related requirements are triggered).

Long-standing Issues. For more than 20 years, courts have ruled that agencies need not prepare regulatory flexibility analyses if the effects of a rule on an industry are indirect.¹⁹ Therefore, for example, if a federal agency is issuing a final rule establishing a health standard that is implemented by states or other entities, the federal agency issuing the rule need not prepare a regulatory flexibility analysis even if it is clear that the implementation ultimately will have significant effect on a substantial number of small entities.²⁰ Likewise, if a federal agency issues a rule directly regulating how long non-immigrant aliens can remain in the United States but indirectly affecting small businesses in the travel industry, the agency can certify that the rule does not have a SEISNSE.²¹ Agencies have also indicated that they do not consider the secondary effects that a rule may have on the cost of compliance with other programs.²²

¹⁹ See, for example, *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985).

²⁰ For example, when EPA published a final rule establishing national ambient air quality standards (NAAQS) for particulate matter in October 2006, the agency certified the rule as not having a SEISNSE “because NAAQS themselves impose no regulations on small entities.” In its cost-benefit analysis for the rule, EPA estimated the cost of installing controls to meet the health standard at \$5.6 billion in 2020. See U.S. Environmental Protection Agency, “National Ambient Air Quality Standards for Particulate Matter; Final Rule,” 71 *Federal Register* 61144, 61217. In a similar case (*American Trucking Associations, Inc. v. U.S. Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir. 1999)), affirmed in part and reversed in part, *Whitman v. American Trucking Associations*, 532 U.S. 457 (2001), the U.S. Court of Appeals for the District of Columbia ruled that EPA had complied with the RFA because the states, not EPA, had the direct authority to impose requirements to control ozone and particulate matter consistent with EPA health standards.

²¹ This example of a 2002 rule issued by the Immigration and Naturalization Service was cited in testimony by the SBA Chief Counsel for Advocacy in support of H.R. 682 in the 109th Congress. Testimony of SBA Chief Counsel for Advocacy Thomas M. Sullivan, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Regulatory Flexibility Improvements Act — H.R. 682*, hearings, 109th Cong., 2nd sess., July 20, 2006.

²² For example, in a 1991 rule, EPA acknowledged that the rule in question may have “trickle down” effects on other EPA programs under the Clean Air Act (CAA), Superfund, or the Resource Conservation and Recovery Act (RCRA), but went on to say that “the purpose of today’s action is solely to establish drinking water standards that public water systems must comply with. Consequently, EPA does not consider the cost of secondary

(continued...)

By clarifying that the term “economic impact” includes indirect effects that are “reasonably foreseeable and result from the rule,” H.R. 4458 might result in more agency rules being viewed as requiring an IRFA, an FRFA, or both.²³ Nevertheless, agencies appear to have substantial discretion in determining what indirect effects are “reasonably foreseeable,” because the proposed legislation does not define that term. Also, even when the indirect effects of a rule are foreseeable, in some cases the agencies may not be able to provide much detail regarding those effects in their IRFAs and FRFAs (e.g., when the implementation details are left to states or local governments).

H.R. 4458 would also clarify how agencies’ reviews under Section 610 of the RFA should be conducted. As a result, agencies would be required to review all of their rules to determine if they currently have a SEISNE, and could not simply rely on their previous determinations when the final rule was published in the *Federal Register*. Enactment of this change could result in substantially more Section 610 reviews, but with a concomitant increase in time and effort required by federal agencies. Still unclear, however, is what constitutes a “rule” under this requirement (e.g., only the provision published in the *Federal Register* or the entire *Code of Federal Regulations* part that the provision amended).

Additional Requirements. Other elements of H.R. 4458 appear to add to the number or depth of the analytical and notification requirements that the RFA currently places on agencies. For example:

- Whereas the RFA currently requires an IRFA to contain a “description” of the reasons why the agency action is being considered and a “succinct statement” of the objectives of and legal basis for the proposed rule, H.R. 4458 would require a “detailed statement” describing those elements.
- Whereas the RFA currently requires that the IRFA contain a description of “and, where feasible, an estimate of the number of small entities to which the proposed rule will apply,” H.R. 4458 would require a detailed description of the type of small entities affected, and would require an estimate of the number of small entities affected or an explanation of why such an estimate is not available.
- If an agency certifies a rule as not requiring an IRFA or a FRFA, H.R. 4458 would require that the statement providing the factual basis for the certification be “detailed.”

²² (...continued)

impacts which may occur under the CAA, Superfund, or RCRA.” U.S. Environmental Protection Agency, “Drinking Water; National Primary Drinking Water Regulations; Monitoring for Volatile Organic Chemicals,” 56 *Federal Register* 30266, July 1, 1991.

²³ The SBA Chief Counsel for Advocacy said his office’s “biggest concern with the RFA is that it does not require agencies to analyze indirect impacts.” See [<http://www.sba.gov/advo/press/07-38.html>].

- Regarding FRFAs, the bill would eliminate the current requirement that the statement of the need for and objectives of the rule be “succinct,” and would require that any explanation of why the number of small entities affected is not available be “detailed.”
- The bill would also require that the FRFA contain the agency’s response to any comments from the SBA Chief Counsel for Advocacy in response to the proposed rule and a detailed statement of changes made to the rule as a result of those comments.

Some public interest groups have expressed concerns that these and other provisions in H.R. 4458 would “add additional layers of analysis to a regulatory process already thick with prescriptive requirements and would further tilt the regulatory playing field in favor of regulated interests.”²⁴ To the extent that agencies strictly adhere to the precise wording of these requirements (e.g., developing a “detailed” statement describing a rule instead of a “succinct” statement), agencies could experience substantially increased rule-development time and compliance costs. However, some of the bill’s requirements appear to codify requirements that are currently in Executive Order 13272 (e.g., the requirement that each agency notify the Chief Counsel for Advocacy when the agency concludes that a rule may have a SEISNSE). Therefore, if agencies are already performing these executive order-required tasks, their codification via H.R. 4458 would not appear to add to the time or agency effort required to issue rules.

On the other hand, some other parts of H.R. 4458 appear to place substantial new requirements on rulemaking agencies — perhaps most notably, the requirement that agencies implement a new 10-year plan for the review of all of their existing rules. For agencies like EPA that have taken a narrow view of Section 610 and only reviewed rules for which they had published an FRFA, this requirement would greatly expand the scope of their Section 610 reviews to all rules. As a result, some agency rules issued decades earlier that had never before been reviewed would, under H.R. 4458, be required to be reviewed. However, this requirement would also affect agencies that have broadly interpreted Section 610. Therefore, for example, even though the Department of Transportation is expected to complete a comprehensive, 10-year process of reviewing all of its rules in 2008, H.R. 4458 would require the department to review all of those rules again.

Some Requirements Appear Unclear. Some elements of this new Section 610 process seem unclear. For example, H.R. 4458 states that each agency is to submit a report annually that includes “the identification of any rule with respect to which the head of the agency made a determination described in paragraph (5) or (6) of subsection (d) and a detailed explanation of the reasons for such determination.” Subsection (d) lists the factors that agencies are to consider in reviewing rules, with paragraph (5) being “The extent to which the rule overlaps, duplicates, conflicts with other Federal rules and, unless the head of the agency determines it to be infeasible, State and local rules.” Paragraph (6) of subsection (d) indicates that agencies’

²⁴ Ralph Lindeman, “House Panel Approves Measure to Require More Agency Review of Regulatory Burdens,” *BNA Daily Report for Executives*, Dec. 14, 2007, p. A-2.

reviews of their rules should consider “The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.”

If an agency determines during its review that a rule *does not* conflict with any other rule, and that the relevant technology and economic conditions *have not* changed since the rule was issued, is the agency to include this “determination” and a detailed explanation of how it reached this conclusion in its annual report? Or is the agency only to include such determinations and explanations for rules that *do* conflict with other rules, or where the technology, economic conditions, or other factors *have* changed? If agencies are expected to provide detailed explanations for decisions in either direction for all the rules they review each year, the agencies’ annual reports to Congress and OIRA could be time consuming and voluminous. On the other hand, if agencies are only to provide information regarding rules that they consider in conflict with other rules, or rules for which relevant factors have changed, then agencies will have strong incentives to reduce their reporting burden and conclude that those conditions are not present. Also, the bill indicates that the annual reports, as well as agency certifications that the 10-year review process needs to be extended, are to be sent to “the Congress,” but the precise recipient is unclear (e.g., the Parliamentarians or a particular committee). It also seems unclear what “the Congress” is to do with the reports and certifications once they arrive.

Value of Mandatory Reviews. More generally, recent work by GAO indicates that statutorily required regulatory reviews are less frequent, and may be less effective, than reviews undertaken at the agencies’ discretion — thereby raising questions about the overall value of statutory review requirements such as Section 610 of the RFA. In a July 2007 report, GAO said most “retrospective reviews” of agency rules between 2001 and 2006 were conducted at the agencies’ discretion, not as a result of mandatory requirements such as Section 610.²⁵ GAO also said that discretionary reviews were more likely to involve the public in the process than mandatory reviews, and were more likely to result in changes to the rules. On the other hand, statutorily required reviews were more likely to have review standards, and were more likely to be documented. GAO recommended that agencies incorporate various elements into their policies and procedures to improve the effectiveness and transparency of retrospective regulatory reviews, and that they identify opportunities for Congress to revise and consolidate existing review requirements.

Bill Does Not Clarify Key RFA Terms. Most notably, however, H.R. 4458 does not appear to address the central criticism that GAO has raised regarding the RFA during the past 20 years — i.e., the lack of clarity and inconsistency in how agencies determine what constitutes a “significant” economic impact or a “substantial” number of small entities. As GAO has pointed out numerous times in the past, unless Congress defines those key terms or requires SBA or some other entity to do so, agencies will be allowed to develop their own definitions, and

²⁵ U.S. Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, July 16, 2007.

therefore can determine when a regulatory flexibility analysis is required. In some cases, agencies have concluded that rules imposing direct compliance costs of thousands of dollars per year on thousands of small entities did not represent a “significant” economic effect on a “substantial” number of small entities.²⁶ With the addition of new requirements that IRFAs and FRFAs be “detailed,” agencies will have even greater incentives to certify their rules and avoid conducting the analyses altogether (although this may be somewhat counterbalanced by the requirement that the factual basis of any certification also be detailed). A similar phenomenon occurred in 1996 when SBREFA required that agencies prepare compliance guides, and that EPA and OSHA conduct advocacy review panels, for any rule that the agencies did not certify. At EPA, the percentage of rules that were certified as not having a SEISNSE increased from 78% in the 30-month period before SBREFA to 96% in the 30-month period after SBREFA.²⁷

As the previous discussion suggests, when agencies certify their rules as not having a SEISNSE, they not only exempt themselves from the requirements that they conduct an IRFA and an FRFA; the agencies will also be able to avoid the related requirements to produce compliance guides and hold advocacy review panels (the “domino effect” that GAO mentioned). Also, agencies will continue to have broad discretion in deciding which rules currently have a SEISNSE, and therefore require review under Section 610 of the RFA. Therefore, the issue of what constitutes a “significant” economic impact and a “substantial” number of small entities affects a number of rulemaking requirements.

As GAO has pointed out in the past, if Congress wanted to address this issue, it could define what a SEISNSE is itself, or it could require that SBA’s Office of Advocacy or some other entity define the term. A combination of both approaches is also possible. For example, even if Congress were to establish a broadly applicable “bright line” for when an IRFA or an FRFA must be prepared (e.g., any rule that is expected to have at least a \$5,000 annual economic impact on at least 5,000 small entities cannot be certified), more industry-specific standards could be developed below that threshold — similar to the way that industry-specific standards have been developed for what constitutes a “small” entity.²⁸

²⁶ For example, EPA concluded that one proposed rule issued in 1999 would affect more than 5,000 small businesses and impose more than \$100 million in compliance costs in the first year, but EPA still certified the rule as not having a SEISNSE. See U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, Sept. 20, 2000. In 1989, EPA certified a rule as not having a SEISNE even though EPA estimated it would impose compliance costs on about 11,000 small public water systems of between \$333 million and \$439 million per year. See U.S. Environmental Protection Agency, “Drinking Water; National Primary Drinking Water Regulations,” 54 *Federal Register* 27486, June 29, 1989.

²⁷ U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, Sept. 20, 2000, p. 16.

²⁸ SBA size standards may be viewed at [<http://www.sba.gov/services/contractingopportunities/sizestandardstopics/index.html>].